FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-607

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIRE, Minors, by and Through AUBREY S. MIREE, JR., and CLAUDE H. ESTES, JR., Co-Guardians of Said Minors,
Petitioners,

versus

DEKALB COUNTY, GEORGIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

ALAN W. HELDMAN
GILBERT E. JOHNSTON
HUGH M. DORSEY, JR.
JULE W. FELTON, JR.
Attorneys for Petitioners

Of Counsel
JOHNSTON, BARTON, PROCTOR, SWEDLAW & NAFF
1212 Bank for Savings Building
Birmingham, Alabama 35203
HANSELL, POST, BRANDON & DORSEY
33rd Floor, First National Bank Tower
Atlanta, Georgia 30303

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Argument:

I. Petitioners did assert applicability of federal law in their complaint 1

II. Petitioners have not misled the Court with respect to cross-claims of the United States 2

III. This Court's recent decision in Jones v. The Rath Packing Company, No. 75-1073 (March 29, 1977) supports our contention that the federal aviation laws preempt any state law rules which thwart accomplishment of federal purposes 3

IV. Respondent's argument that the central issue in this case is not aviation but "operation of a sanitary landfill," a purely "local governmental function," is wholly at odds with reality 4

AUTHORITIES CITED

Cases Cited

Jones v. The Rath Packing Company, — U.S. — (No. 75-1053; March 29, 1977) 3

United States v. California, 332 U.S. 19 (1947) 2

United States v. California, 328 F.2d 729 (9th Cir. 1964), cert. den. 379 U.S. 817 (1964) 2

United States v. State of Illinois, 454 F.2d 297 (7th Cir. 1971) 2

United States v. Texas, 339 U.S. 707 (1950) 2

United States v. Texas, 143 U.S. 621 (1892) 2

Other Authorities Cited

Wright & Miller, "Federal Practice and Procedure," V. 6, §1431 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-607

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIRE, Minors, by and Through AUBREY S. MIREE, JR., and CLAUDE H. ESTES, JR., Co-Guardians of Said Minors,
Petitioners,

versus

DEKALB COUNTY, GEORGIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

I

DeKalb County's brief suggests at pages 30 and 31, and elsewhere, that we filed this action purely as a diversity case, seeking only state law remedies. We disagree. Our complaint at ¶28 (A. 21), as pointed out in our brief at page 7, charged that maintenance of the garbage dump at the County's airport constituted an airport hazard as defined in the Federal Aviation

Acts. Moreover, an amendment to our complaint further charged at ¶56 (A. 67, 68) that under the Federal Aviation Acts DeKalb County had, by virtue of its operation of the airport, expressly or impliedly waived its immunity. We thus promptly and properly pleaded violations of federal statutes and pleaded waiver of immunity as a matter of federal law.

II

Page four of the Brief of Respondent DeKalb County states that our brief at page forty-two "misleads this Court into believing that DeKalb County is still a party to the present actions in the Lower Court pursuant to cross-claims initiated by the United States."

It is our position that the cross-claims of the United States are still pending and that the statement on page forty-two of our brief, that the cross-claims have not been dismissed, is correct. We rely upon the record, as summarized by the docket entries (Joint Appendix pp. 1-8). An entry (A. 4) of February 15, 1974 shows the cross-claim of the United States filed. An entry of February 27, 1974 (A. 5) shows the answer of DeKalb County to the cross-claim of the United States filed. The United States also filed a memorandum of law (which does not appear in the docket entries), dated February 21, 1974, citing clear authority for the inapplicability of any state law immunity doctrine vis a vis claims of the United States: *United States v. Texas*, 339 U.S. 707 (1950); *United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 143 U.S. 621 (1892); *United States v. California*, 328 F.2d 729 (9th Cir. 1964), *cert. den.* 379 U.S. 817 (1964); *United States v. State of Illinois*, 454 F.2d 297 (7th Cir. 1971). Docket entries (A. 6) of June 27, 1974 show orders of the District Court granting DeKalb County's motion to dismiss plaintiffs' complaint and include a notation as follows: "U S's cross-claims against DeKalb County

still pending." Then by order dated September 25, 1974 (App. to our Cert. Petit., A-32) the District Court reconsidered its June 27, 1974 order, which had dismissed plaintiffs' claims against the County, and denied the motions to set aside that June 27, 1974 order. It is from this September 25, 1974 order that appeal was taken, and it is the opinion of the Court of Appeals with respect thereto which resulted in our seeking certiorari. The issue of the United States' cross-claim against DeKalb County has *not* been considered by the courts below and there is no order dismissing that cross-claim. Moreover, the cross-claim cannot be deemed to have been extinguished merely because of the District Court's order (which in any event is still the subject of the instant appeal) dismissing the plaintiffs' claims against the County.[1]

If our analysis of the record is incorrect, and the District Court *has* actually purported to determine that the County is immune from suit on contract by the United States itself, with which it contracted pursuant to statute, then we respectfully suggest that the error of the District Court is even greater than we have heretofore contended.

III

Since our brief was submitted, this Court issued its opinion in *Jones v. The Rath Packing Company*, No. 75-1053, on March 29, 1977. The Court there held:

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The

---

[1] Wright & Miller, "Federal Practice and Procedure," v. 6, §1431 at p. 163: "However, the subsequent dismissal of the original claim itself, or the dismissal of that claim against the coparty, does not require that a previously interposed cross-claim also should be dismissed."

> criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

The dissent from that opinion by Justices Stewart and Rehnquist pointed out that regulation of flour is a field which the states have traditionally occupied, and that the Court should thus be hesitant in finding federal preemption. Those concerns are inapplicable in our case, where state law, as construed and applied by the District Court, clearly stands as an obstacle to the accomplishment and execution of the federal purposes of safety and uniformity of result in civil aviation. These are important federal interests in a field which federal law has clearly preempted, and which has never been a traditional concern of the states.

IV

We stated in our principal brief that as this litigation has progressed we have increasingly become persuaded of the necessity for federal law to govern the rights and remedies of parties killed or injured by reason of a serious breach of safety provisions in a federal contract for operation of an airport in commerce. We urged that federal common law should apply and that federal common law should both (a) recognize the rights of the dead and injured as third-party beneficiaries of that contract, and (b) implement federal policies of uniformity and high safety standards by refusing to enforce a local law rule of immunity.

We offer the County's brief to this Court as additional argument for the need of federal law to enforce safety by applying proper federal common law rules to govern this case. The County, which owned and operated this airport in commerce, and which accepted federal money to develop it and run it, and which contracted with the FAA to maintain it safely for the use and benefit of the public and the aeronautical users, and which bought an airport liability insurance policy containing a clause to the effect that immunity would not be asserted (A. 53-54 and A. 74), now tells the Court at page 6 of its brief that "clearly, the central issue in this case is the operation of a *sanitary landfill* [emphasis in original], which is obviously a local governmental function, lacking in any federal consequence . . . ." And at the same page the County's brief contends that its "shield of immunity" is not "tarnished" (page 6, respondent's brief). We submit that the County's metaphor is as medieval as its doctrine—a doctrine that federal law need not and ought not embrace.

ALAN W. HELDMAN
GILBERT E. JOHNSTON
HUGH M. DORSEY, JR.
JULE W. FELTON, JR.
Attorneys for Petitioners

Certificate of Service

I hereby certify that three copies of the foregoing Brief have this date been served by mail upon all parties represented in this proceeding this .... day of April, 1977.

Alan W. Heldman

2025 Season

7th Grade

4th Grade